

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 30, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board

—
In re Indestructible Shoes LLC

—
Serial No. 88615185

Francis J. Ciaramella of Francis John Ciaramella, PLLC, for Indestructible Shoes LLC.

Bridget Watson, Trademark Examining Attorney, Law Office 128,
Travis Wheatley, Managing Attorney.

—
Before Taylor, Larkin and Lebow,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Indestructible Shoes, LLC, filed an application to register the composite mark depicted below on the Principal Register for use in connection with “shoes” in International Class 25:¹



¹ Application Serial No. 88615185 was filed on September 12, 2019, based on Applicant’s declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). “The mark consists of a diamond design made of six parallelograms. To the right of the design is the wording ‘INDUSTRUCTIBLE’ in a stylized font.”

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with "shoes," so resembles the registered mark INDESTRUCTIBLE and Design (as depicted below) for "athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; Athletic shirts; Body shirts; Button down shirts," in International Class 25:²



After the refusal was made final, Applicant requested reconsideration and filed an appeal to this Board. After the request for reconsideration was denied, the appeal resumed and is now briefed. For the reasons discussed below, we affirm the refusal to register.

² Registration No. 4928050 issued on the Principal Register on March 29, 2016. A Section 8 declaration has been filed and accepted. The registration includes the following description of the mark: "The mark consists of flames in dark blue, blue and light blue emanating from a stylized design of a sword. The hilt of the stylized sword design is in the colors black, brown, bronze, copper, gold, and yellow and contains a dark blue jewel with a light blue center. The blade is in navy blue, dark blue, blue and light blue shading. Surrounding the combination of blue in the blade is a combination of dark brown, brown and copper that transitions into yellow and gold towards the tip of the blade. Inside the blue combination of the blade there is a pattern design of brown, yellow and white. The stylized sword design and its various parts are outlined in white. Near the bottom of the image and in front of the bottom of the sword is the wording 'INDESTRUCTIBLE' in black, dark blue, blue, and light blue with an incomplete box outline surrounding the wording in dark brown, brown, copper, and gold. The letters 'RU' in 'INDESTRUCTIBLE' are partially outlined in white where it overlaps the sword image." The colors blue, light blue, navy blue, dark blue, gold, yellow, bronze, black, brown, copper, dark brown and white are claimed as features of the mark.

I. Likelihood of Confusion – Applicable Law

“The Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion [or] mistake, or to deceive.” *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at *2 (Fed. Cir. 2023) (cleaned up). Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); see also *In re Charger Ventures*, 2023 USPQ2d 451, at *4.

We consider each *DuPont* factor for which there is evidence and argument. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc’ns., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). Varying weight, however, may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Moreover, “each case must be decided on its own facts

and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods and services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods [or services].’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). We address these two factors and other relevant *DuPont* factors below.

A. Similarity or Dissimilarity of the Goods and Channels of Trade

We begin with the second and third *DuPont* factors which, respectively, consider “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” and “the similarity or dissimilarity of established, likely-to-continue trade channels.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567); *see also Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *19 (TTAB 2021).

We must base our comparisons under the second and third *DuPont* factors on the identifications of goods in the application and the cited registration. *In re Charger*

Ventures, 2023 USPQ2d 451, at *6 (“The relevant inquiry in an ex parte proceeding focuses on the goods and services described in the application and registration.”) (emphasis omitted); *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLC*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

The goods “need not be identical or even competitive to find a likelihood of confusion.” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *4 (TTAB 2019) (citing *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000)). “They need only be ‘related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Id.* (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007))).

The Examining Attorney asserts that “there is overlap between the [respective] because applicant provides ‘shoes’ and registrant provides ‘athletic apparel, namely ... footwear.’”³ We agree. A “shoe” is “a strong covering for the foot, often made of leather”⁴ and “outer covering for the foot, usually of leather with a stiff or thick sole

³ 8 TTABVUE 9 (Examining Attorney’s Brief).

⁴ See <https://dictionary.cambridge.org/dictionary/essential-american-english/shoe>, accessed on September 29, 2023 from the CAMBRIDGE DICTIONARY – ESSENTIAL AMERICAN ENGLISH DICTIONARY. “The Board may take judicial notice of information from dictionaries and encyclopedias,” and we do so here. See *B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846

and heel, and generally (distinguishing it from a boot) reaching no higher than the ankle.”⁵ “Footwear” is “attire, such as shoes or slippers, for the feet.”⁶ Hence, the respective goods are legally identical in part. Unrestricted and broad identifications are presumed to encompass all goods of the type described. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

In addition, the Examining Attorney provides website evidence from third-party shoe retailers Nike, Adidas, North Face, Columbia, LL Bean, Under Armour, Merrel, Old Navy, and Reebok, showing that they all offer footwear and athletic shirts under their respective house marks.⁷ He asserts that this evidence “establishes that the same entity commonly manufactures, produces, or provides the relevant goods and/or services and markets the goods under the same mark.”⁸

We agree with Applicant that “there is **no** per se rule that various types of wearing apparel are related,”⁹ *see In re Embiid*, 2021 USPQ2d 577, at *26 (TTAB 2021), but here the goods are legally identical in part, and the third-party evidence of record clearly demonstrates that Applicant’s shoes are not only related to Registrant’s

F.2d 727, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988) (“dictionaries and encyclopedias may be consulted”).

⁵ *See* <https://www.britannica.com/topic/shoe>, accessed on September 29, 2023, from the BRITANNICA ENCYCLOPEDIA.

⁶ *See* <https://www.ahdictionary.com/word/search.html?q=footwear>, accessed on September 29, 2023, from THE AMERICAN HERITAGE DICTIONARY.

⁷ December 5, 2022 Final Office Action, TSDR 10-128.

⁸ 8 TTABVUE 9 (Examining Attorney’s Brief).

⁹ 6 TTABVUE 10 (Applicant’s Brief).

athletic footwear, but also its athletic shirts.

Applicant also argues that “the two respective goods/services offered by the parties are not confusingly similar, especially in light of the overwhelming differences between the respective marks’ commercial impressions,”¹⁰ which is meritless in view of the legal identity of the respective goods. Applicant also argues that “a consumer in commerce, when shopping for shoes bearing the logo INDESTRUCTIBLE, could not possibly conclude that that [Applicant’s] shirt showing a flame-engulfed sword design sold by the Prior Owner is affiliated or sponsored by the Applicant or vice-versa.”¹¹ This is nothing more than attorney argument, which is no substitute for evidence. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018), quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”).

Because the respectively identified goods are legally identical and, as the Examining Attorney notes, have “no restrictions as to nature, type, channels of trade or classes of purchasers,” they are “presumed to travel in the same channels of trade to the same class of purchasers.”¹² See *In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)) (“It is well-established that ‘absent restrictions in the application and registration, goods and services are

¹⁰ *Id.*

¹¹ *Id.* at 11.

¹² 8 TTABVUE 13 (Examining Attorney’s Brief).

presumed to travel in the same channel of trade to the same purchasers. *See also Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *49 (TTAB 2022) (same); *Double Coin Holdings, Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6 (TTAB 2019) (same). Applicant does not challenge the Examining Attorney's conclusion that the channels of trade and classes of customers are the same.

The second and third *DuPont* factors weigh heavily in favor of finding a likelihood of confusion.

B. The Number and Nature of Similar Marks in Use on Similar Goods

The sixth *DuPont* factor considers the “nature and number of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567. This factor potentially impacts our analysis of the similarity or dissimilarity of the marks under the first *DuPont* factor because the “purpose of introducing evidence of third-party use is ‘to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different [such] marks on the bases of minute distinctions.’” *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)).

Applicant invokes this factor by providing Trademark Electronic Search System (“TESS”) printouts of five third-party registrations for the following marks: INDESTRUCTAWOOL (Reg. No. 5917860) for “socks made in whole or in significant part of wool”; INDESTRUCTIBELT EST. 2016 and Design (Reg. No. 5166099) for “belts”; FUMETSU (Reg. No. 6430389), which, according to the translation statement

in the TESS printout, translates into English as “immortal” or “indestructable” [sic] for various goods including “footwear”; INDESTRUCTABLE (Reg. No. 2601930) for “furniture”; and INDESTRUCTIBLE (Reg. No. 6471683) for various types of eyeglasses and sunglasses.”¹³ With respect to these registrations, Applicant argues:

If these marks as well as the Prior Mark are able to coexist with so many other similar trademarks for analogously similar services, then it can also be said that there is room for Applicant’s mark INDESTRUCTIBLE. Applicant submits that such extensive use of said words in this manner by third parties for similar goods or services entitles Applicant [sic] to a reduced scope of protection, which weighs against a finding of likelihood of confusion.¹⁴

Applicant’s argument is unavailing. Three of the five marks in these third-party registrations – INDESTRUCTAWOOL, INDESTRUCTABLE, INDESTRICITBELT EST. 2016 and Design, and FUMATSU – are not relevant because they do not contain the word “indestructible.” *See Inn at St. John’s*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d*, 777 F. App’x 516 (Fed. Cir. 2019) (discussing limited probative value of third-party registrations of marks containing differing terms from those in the involved marks, even when used for identical services). *See also In re Embiid*, 2021 USPQ2d 577, at *37 (use of sets of third-party registrations not probative of weakness or consumer distinction for a different mark or term).

This leaves two marks to consider, INDESTRUCTIBLE and the slightly misspelled mark INDESTRUCTABLE, in the remaining registrations, but the probative value of these two registrations is diminished significantly because the

¹³ March 3, 2023 Request for Reconsideration, TSDR 35-41.

¹⁴ 6 TTABVUE 14 (Applicant’s Brief).

goods are unrelated. *See Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 128 USPQ2d at 1693-94 (the controlling inquiry under the sixth *DuPont* factor is the extent of third-party marks in use on “similar” goods or services and where the goods are identical, third-party uses on other goods “have no real probative value”); *In re i.am.symbolic, LLC*, 123 USPQ2d at 1751 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration).

In any event, registrations, standing alone, are not evidence of use of the marks identified therein, or that the public is familiar with them, and two third-party registrations for the word INDESTRUCTIBLE, or its phonetic equivalent INDESTRUCTABLE for disparate goods, are hardly sufficient to show that the term has been diluted and that Registrant’s mark should be accorded a lesser scope of protection. *See In re Morinaga Nyugyo K. K.*, 120 USPQ2d 1738, 1745 (TTAB 2016) (“Applicant’s citation of third-party registrations as evidence of market weakness is unavailing because third-party registrations standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.”); *In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1167 n.5 (TTAB 2013) (“[T]he mere existence of third-party registrations is not evidence that the registered marks are actually in use or that the public is familiar with them.”).

We acknowledge that the word “indestructible” is suggestive of goods that cannot be destroyed and thus there is some weakness to the term, conceptually. But “even weak marks are entitled to protection against registration of similar marks for identical or similar [goods].” *In re Charger Ventures*, 2023 USPQ2d 451, at *3 (citing cases). Furthermore, Registrant’s mark is registered on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), and without a disclaimer of the exclusive right to use the term “indestructible.” We must therefore presume that it is inherently distinctive, suggestive of the goods at most, and should be accorded the scope of protection to which inherently distinctive marks are entitled. *See Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *27 (TTAB 2023), citing *New Era Cap. Co., Inc. v. ProEra LLC*, 2020 USPQ2d 10596, at *10 (TTAB 2020)) (“Opposer's mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act.”); *Maytag Co. v. Luskin’s, Inc.*, 228 USPQ 747, 750 (TTAB 1986) (“there is nothing in our trademark law which prescribes any different protection for suggestive, nondescriptive marks than that which is accorded arbitrary and fanciful marks”); *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) (“the fact that a mark may be somewhat suggestive does not mean that it is a ‘weak’ mark entitled to a limited scope of protection:”).

The sixth *DuPont* factor is neutral in our analysis.

C. Similarity or Dissimilarity of the Marks

We turn now to the first *DuPont* factor, which considers the “similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation

and commercial impression.” *DuPont*, 177 USPQ at 567; *see also Stone Lion Cap. Partners*, 110 USPQ2d at 1160. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014), *aff’d*, 777 Fed. Appx. 516 (Fed. Cir. 2019)).

The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs.*, 101 USPQ2d at 1721. We focus on the recollection of the average purchaser, here an ordinary consumer seeking to purchase shoes, who normally retains a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Indeed, “[b]y their nature, shoes ... are ‘general consumer goods’ that are ‘marketed to the general population, and are purchased or used in some form by virtually everyone.” *See In re Embiid*, 2021 USPQ2d 577, at *42.

The Examining Attorney argues that “Applicant’s mark creates a confusingly similar impression to that of registrant’s mark because the word portion of the marks is identical.”¹⁵ She notes that while the marks differ in terms of their design feature, “when evaluating a composite mark consisting of words and a design, the word

¹⁵ 8 TTABVUE 3 (Examining Attorney’s Brief).

portion is normally accorded greater weight because it is likely to make a greater impression upon purchasers, be remember by them, and used by them to refer to or request the goods and/or services.”¹⁶ See *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra*, 101 USPQ2d at 1908 (“In the case of marks, such as Applicant's, consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.”). We note, in addition, that “[t]he verbal portion of a word and design mark ‘likely will appear alone when used in text and will be spoken when requested by consumers.’” *Id.* (quoting *Viterra*, 101 USPQ2d at 1908).

We agree with Applicant that “similarity as to one aspect of the sight, sound, and meaning trilogy will not automatically result in a finding of likelihood of confusion when the goods are identical or closely related,”¹⁷ but here, we find that the marks in their entirety are similar in sight notwithstanding differences in their design features, and they are identical in sound and meaning. As the Examining Attorney notes, Applicant attempts to support its argument “by providing a side-by-side display of the applied-for mark next to the registered mark and describing the relevant design features of each,” but again, the issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather “whether the marks are sufficiently similar in terms of their commercial impression such that

¹⁶ *Id.* at 4.

¹⁷ 6 TTABVUE 5 (Applicant’s Brief).

persons who encounter the marks would be likely to assume a connection between the parties,” *Coach Servs.*, 101 USPQ2d at 1721 (citation and internal quotations omitted), which we find to be the case here.

The first *DuPont* factor weighs in favor of finding a likelihood of confusion, particularly in view of the lesser similarity required because the respective goods are overlapping.

D. Purchasing Conditions

The fourth *DuPont* factor considers the “conditions under which and buyers to whom sales are made, i.e., ‘impulse vs. careful, sophisticated purchasing.’” *Embiid*, 2021 USPQ2d 577, at *31 (quoting *DuPont*, 177 USPQ at 567). A heightened degree of care when making a purchasing decision may tend to minimize likelihood of confusion. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 224 USPQ 969, 971 (Fed. Cir. 1985). Conversely, impulse purchases of inexpensive goods or services may tend to have the opposite effect. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1695 (Fed. Cir. 2005)).

Applicant argues that “buyers of the respective goods and services will be a sophisticated [sic]. In other words, consumers making purchases of services [sic] from either the Applicant or the Prior owner are well-educated, and not likely to make such purchases on impulse. As such, the services [sic] offered by the Applicant and Prior Owner are aimed at discriminating purchasers.” Applicant, however, submitted no evidence to support this argument of its counsel. *See Cai v. Diamond Hong*, 127 USPQ2d at 1801 (“Attorney argument is no substitute for evidence.”) (quotation omitted). Regardless, there is nothing about the nature of Applicant’s or Registrant’s

goods that suggests their purchasers are particularly sophisticated or careful. The fourth *DuPont* factor is neutral in our analysis.

E. Additional *DuPont* Factors

Applicant provides additional arguments that lack merit because they are either unsupported or irrelevant. Under the fifth *DuPont* factor, which concerns “[t]he ‘fame of the prior mark,’ *DuPont*, 177 USPQ at 567, Applicant argues that “there is no evidence that the cited Prior Mark is famous or has acquired secondary meaning within the marketplace or that consumers associate the term INDESTRUCTIBLE with the Prior Owner.”¹⁸ However, the absence of evidence regarding the fame of the prior mark is not particularly significant in the context of an ex part appeal and is normally treated as neutral when no evidence of fame has been provided. *See In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1086 (TTAB 2016); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009); *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006). Therefore, we find this factor neutral.

Under the twelfth and seventh *DuPont* factor, which concern, respectively, “[t]he extent of potential confusion (de minimis or substantial),” and “[t]he nature and extent of any actual confusion,” Applicant argues that “any potential confusion between the respective marks would be de minimis, especially given that there have been no present documented cases of actual confusion.”¹⁹ We disagree. First, we have already found that the goods are legally identical; the channels of trade and the

¹⁸ 6 TTABVUE 12 (Applicant’s Brief).

¹⁹ *Id.* at 14.

classes of consumers are presumed to be the same for Applicant's and Registrant's goods; and the marks are similar. In view thereof, the potential for confusion cannot be deemed to be de minimis. Second, a lack of evidence of actual confusion carries little weight in an ex parte case such as this. *See In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) (a lack of evidence of actual confusion carries little weight in an ex parte case); *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at *7 (TTAB 2020) (“[I]n this ex parte context, there has been no opportunity to hear from Registrant about whether it is aware of any reported instances of confusion.”). *See also Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983) (“[I]t is unnecessary to show actual confusion in establishing likelihood of confusion.”). We therefore find the twelfth and seventh *DuPont* factors neutral.

F. Conclusion

Having found that Applicant's and Registrant's goods are legally identical and travel in the same channels of trade to the same consumers under the second and third *DuPont* factors, and that the respective INDESTRUCTIBLE and Design marks are similar under the first factor, with no other factors being relevant, we conclude that there is a likelihood of confusion.

Decision: The refusal under Section 2(e)(1) is affirmed.